



John Peters - LT <john.h.peters@gsa.gov>

FW: Question for GAO

1 message

Amin, Faisal <AminF@gao.gov>

Mon, Apr 6, 2020 at 5:52 PM

To: "Claudia Nadig General Services Administration (claudia.nadig@gsa.gov)" <claudia.nadig@gsa.gov>, John Peters - LG john.h.peter @g a gov

Cc: "Wesco, Crystal" <WescoC@gao.gov>, "Howard, James A" <HowardJA@gao.gov>

Hi Claudia and John,

Thanks so much for reaching out. And for providing these cases and the fact pattern you're considering.

I'm adding to this email my colleagues, Crystal and Andrew, who will look into this matter with me. Would you be available at 4pm on Tuesday, April 7, for a call? If not, how about 10am on Wednesday, April 8?

Thanks very much and looking forward to our chat!

Faisal

From: John Peters - LG john.h.peter @g a gov**Sent:** Monday, April 6, 2020 4:24 PM**To:** Amin, Faisal AminF@gao.gov**Cc:** Claudia Nadig - LG <claudia.nadig@gsa.gov>**Subject:** Re: Question for GAO

Hey Faisal,

Thank for agreeing to help out once again. I am attaching a few of the relevant GAO cases I found along with a quick summary of the issue. Our clients at GSA are building a web site that disseminates certain federal government information to the public on a number of different topics. This process involves conducting research with end users to improve the user experience and ensure the site is presenting information in a way that's most helpful to the public. To do this, our clients are seeking to hire a company that will recruit end users to participate in user research. The contractor would conduct the interviews using questions we provide and then pass the information to GSA. Individuals who participate in this user testing will be compensated at the rate of \$75 per hour. GSA would reimburse the contractor for its costs, including the amount it pays end users who participate in this research.

We have read through the GAO cases on prizes and incentives. They all generally discuss the benefit to the government by collecting the information and whether it advances an agency's statutory requirement. Those cases all involve personal items/gifts in the form of gift cards, baseball caps, or prize drawings.

(b) (5)

From: Claudia Nadig - LG <claudia.nadig@gsa.gov>
Sent: Monday, April 6, 2020 2:00 PM
To: Amin, Faisal <AminF@gao.gov>
Cc: John Peters - LG <john.h.peters@gsa.gov>
Subject: Question for GAO

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John and I have an appropriations law question about authority to pay people who provide feedback.

Claudia Nadig
Deputy Associate General Counsel - LG
Office of General Counsel
General Services Administration

(b) (6)

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John H. Peters
Senior Assistant General Counsel
General Law Division, Office of General Counsel
U.S. General Services Administration


(b) (6)

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4 attachments

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 **B 323122 pdf**
98K



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Prize Drawing by General Services Administration's Public Buildings Service

File: B-286536

Date: November 17, 2000

DIGESTS

1) The General Services Administration's (GSA) Public Buildings Service (PBS) distributes customer surveys to employees of tenant-agencies in GSA-managed buildings in order to develop customer satisfaction information. To enhance the response rate to the surveys, PBS proposes to use the Federal Buildings Fund to provide work-related prizes to survey recipients whose names PBS chooses in a drawing connected to the survey. Since GSA has established that customer satisfaction information is useful in carrying out its statutory mission to operate, maintain and protect federally owned and leased buildings, and since the survey recipients have no statutory, regulatory or employment-related duty to reply to the survey, we have no objection to GSA's use of the Federal Buildings Fund for this purpose.

2) Because an award of prizes in a drawing accompanying a survey might be construed to contain elements of a lottery prohibited by certain federal criminal statutes and regulations, see 18 U.S.C. §§ 1301-1304, GSA should consult with the Department of Justice to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

DECISION

By letter of October 11, 2000, the General Services Administration (GSA) requested an advance decision on whether the Public Buildings Service (PBS) may use appropriated funds to pay for prizes in a drawing held in connection with customer satisfaction surveys. PBS proposes to conduct the drawing and award prizes in order to increase the response rate to customer satisfaction surveys and achieve a statistically valid representation of the satisfaction level of its customers. We

conclude that PBS may use appropriated funds to pay for prizes in a drawing held in connection with customer satisfaction surveys to the extent discussed below.¹

BACKGROUND

Pursuant to section 210(a) of the Federal Property and Administrative Services Act of 1949, as amended (codified as 40 U.S.C. § 490), the Administrator, General Services, is responsible for the operation, maintenance, and protection of all government owned and leased buildings under GSA control. According to GSA, its inventory comprises approximately 40% of all federal office space. Pursuant to the Public Buildings Act of 1959 (codified as 40 U.S.C. §§ 601-619), the Administrator also is responsible for the construction and alteration of public buildings. The Act requires the Administrator to make a continuing investigation and survey of the public building needs of the federal government in order to remain informed regarding the building needs of all federal agencies. 40 U.S.C. § 611(a)-(b). The Administrator has delegated these responsibilities to GSA's Public Buildings Service.

The Government Performance and Results Act of 1993 (GPRA) requires federal agencies to set goals, measure performance, and report on their accomplishments. Pub. L. No. 103-62, 107 Stat. 285. The Act requires agencies to develop strategic plans that include comprehensive mission statements based on the agency's statutory requirements, a set of strategic goals, and a description of how the agency intends to achieve these goals. In its submission to us, GSA explained that its mission, as articulated in its strategic plan, is to provide policy leadership and expert

¹ Pursuant to the Paperwork Reduction Act of 1995 (PRA) "an agency shall not conduct or sponsor the collection of information unless...[the Office of Management and Budget] has approved the proposed collection of information..." 44 U.S.C. 3507(a) & (a)(3). The Office of Management and Budget's (OMB) implementing regulations state, however, that an agency does not need to seek OMB review and approval to survey federal employees acting in their professional capacities. 5 C.F.R. 1320.3(c)(4). Accordingly, GSA is not required to seek OMB review and approval before implementing the drawing and customer satisfaction survey discussed in this decision.

An agency that proposes to conduct a survey that is subject to PRA review is required to justify to OMB any strategy that relies on incentives. 5 C.F.R. 1320.5(a)(1)(iii)(D). Pursuant to guidance that OMB has issued as an exposure draft, OMB would conduct a case-by-case review to ensure that incentives are only used in the context of a rigorous design that is professionally implemented. OMB would also review proposals to ensure that incentives are not used to offset the effects of poor questionnaires, inadequate follow-up, imposition of inappropriate risks, or other deficiencies that compromise respondent cooperation. See The Paperwork Reduction Act of 1995: Implementing Guidance for OMB Review of Agency Information Collection, Office of Information and Regulatory Affairs, Office of Management and Budget (draft, Aug. 16, 1999).

The goal of the PRA is not only to minimize the federal paperwork burden, but also to maximize the utility of information the government produces, as well as to ensure its integrity. 35 U.S.C. 3501(10). While OMB's regulations exempt surveys of federal employees acting in their professional capacities from OMB review, any agency proposing to use incentives may wish to consider consulting with OMB before implementing its proposal.

solutions in services, space and products, at the best value, to enable federal employees to accomplish their missions.

One approach PBS has chosen to advance its statutory mission is to collect information on its customers' satisfaction with PBS's services through the use of customer satisfaction surveys. The survey requests that federal employees² of tenants in GSA-controlled buildings rate their level of satisfaction with their building and office environment, the services provided by the building management staff, and safety and security issues in the building. The goal of the survey is to measure performance as well as to identify long and short term program improvements. According to material provided to us by GSA, average national response rates to PBS customer satisfaction surveys declined from a 52% response rate in 1993, to a 32% response rate in 1998, despite continuous efforts and the use of a variety of approaches to increase overall response rates.

In 1999, GSA awarded a contract to Gallup Organization to assist PBS in conducting its customer satisfaction surveys. To counter the decline in survey response rates, in January 2000, PBS, with the assistance of Gallup, conducted a pilot test using a drawing in conjunction with a standardized customer satisfaction survey. PBS distributed drawing entry forms along with the survey. To participate in the drawing, recipients had to submit the drawing entry form, but were not required to complete the survey.³ The Gallup Organization advised PBS that a small proportion of people will return the drawing entry form only and not complete the survey; however, the usual result is that more people complete the survey than would if there were no drawing. PBS awarded three laptop computers as grand prizes, as well as 150 portfolio cases, to employees whose forms were pulled in the drawing. According to material provided by GSA, following the pilot, the overall response rate rose from 32% to 51%. In addition, following the pilot test, the number of buildings surveyed that had response rates below 30% declined from 25% of buildings surveyed in 1998, to 8.9%. GSA has stated that according to Gallup, a response rate of at least 30% is needed to have confidence that the survey results are valid and representative of the satisfaction level of survey respondents. GSA proposes to formalize its pilot as a regular, annual practice. In fiscal year 2001, PBS plans to expand the survey and drawing to include its regional offices. As a result, the number of laptop computers awarded as grand prizes will increase from three to eleven. In addition, 150 leather portfolio cases filled with work-related items will be awarded. GSA estimates that the total annual cost of the prizes will not exceed \$35,000.

GSA proposes to pay the costs of the prizes from the Federal Buildings Fund. Monies deposited into the fund are available for expenditures for real property management and related activities in such amounts as are specified in annual

² Recipients of surveys are randomly selected staff of GSA-tenant agencies not necessarily involved in building management.

³ PBS employees are not eligible to participate in the drawing.

appropriations acts. 40 U.S.C. § 490(f). The Treasury and General Government Appropriations Act, 2000, permitted revenues and collections deposited into the Federal Buildings Fund to be used for necessary expenses of real property management and related activities, including operation, maintenance, and protection of federally owned and leased buildings. Pub. L. No. 106-58, 113 Stat. 430. On October 30, 2000, the President vetoed the combined Legislative Branch and Treasury-Postal Service appropriations bill for fiscal year 2001, which included similar language.⁴

DISCUSSION

Pursuant to 31 U.S.C. § 1301(a) (1988), appropriated funds may be used only for authorized purposes. Even if a particular expenditure is not specifically provided for in the appropriation act, the expenditure “is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of the function, and if it is not otherwise prohibited by law.” 66 Comp. Gen. 356 (1987).

We have held that whether or not a particular expense is necessary in fulfilling an authorized purpose is, in the first instance, a matter of agency discretion. B-223608, Dec. 19, 1988. When we review an expense to determine if it is necessary to fulfill an authorized purpose, we determine whether the expense falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond the range. *Id.*; 70 Comp. Gen. 720 (1991).

We have concluded in several instances that agencies may use appropriated funds to provide prizes to individuals to further the collection of information necessary to the accomplishment of the agency’s statutory mandate. For example, in 70 Comp. Gen. 720 (1991), we held that the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, could use appropriated funds to pay cash prizes to encourage fishermen to return information used by NOAA for research on the history and migration rate of certain fish. To facilitate this research, NOAA issued fish tags containing questions about the circumstances under which the fish was caught. NOAA had been distributing a \$5 reward for the return of each fish tag, but proposed expanding the reward program to include the alternative of participating in an annual drawing for a limited number of cash prizes. NOAA proposed to offer \$1,000 for first prize and \$500 each for two additional prizes.

In our decision, we noted that the Department of Commerce is statutorily required to conduct research to support fishery conservation and management. Because the prizes were intended to induce fishermen to return fish tags that would facilitate

⁴ Since October 1, 2000, GSA has been operating under a series of continuous resolutions that allow GSA to continue activities for which appropriations were available during the previous fiscal year. *See, e.g.*, Pub. L. No. 106-275, 114 Stat. 808 through October 6, 2000, and H.R.J. Res. 125, 106th Cong. (2000) through December 5, 2000.

NOAA's acquisition of information needed for its statutorily required research, the proposed prizes were reasonably necessary to the accomplishment of an authorized purpose.

We also concluded that the Army could use appropriated funds to pay for framed posters, which the Army distributed as prizes to winners of drawings in order to collect information needed for recruiting purposes. B-230062, Dec. 22, 1988. The Army was statutorily required to conduct "intensive recruiting campaigns to obtain enlistments" and annual appropriations were provided for this purpose. The purpose of the prizes was to prompt individuals to provide "directory information" to the recruiters, including addresses and telephone numbers, in order to "continue the dialogue" with potential recruits. We found a direct connection between the purchase of posters to obtain recruiting information and the Army's statutory mandate to "conduct an extensive recruiting campaign." Therefore, this was a permissible expenditure of appropriated funds.⁵

Factually, there is one difference between this case and the decisions discussed above. In those decisions, the agencies awarded prizes to the general public whereas here GSA proposes to award prizes to federal employees. We do not view this distinction as meaningful under the circumstances presented here. First, GSA proposes to randomly distribute surveys and drawing cards to federal employees in GSA-tenant buildings to ensure that survey recipients will represent many different agencies and job classifications. Second, most of the employees selected to receive the survey will be under no statutory, regulatory, or employment-related requirement to return the survey to GSA.⁶ In this particular drawing, federal employees will not be receiving prizes for what they already are required to do, and are in this sense akin to the general public.

While the Federal Buildings Fund does not specifically provide budget authority to GSA to cover the cost of prizes, we see a direct connection between the purpose of the Fund and the use of prizes to increase the response rate to customer satisfaction surveys. Because GSA's statutory mission is to operate, maintain, and protect GSA-controlled buildings as well as to ensure that the building needs of federal agencies

⁵ See also decisions dealing with rewards for the furnishing of information that is necessary to the effective administration and enforcement of the law. B-172259, April 29, 1971 (holding that the Forest Service, which is statutorily responsible for protecting the national forests from destruction, could use appropriated funds to pay individuals for information regarding violations of laws and regulations protecting national forests); B-106230, Nov. 30, 1951 (holding that the Treasury Department could reward informers for information or evidence on violations of the revenue, customs, or narcotics laws under an appropriation for the necessary expense of law enforcement); B-117628, Jan. 21, 1954 (holding that the Commerce Department could pay rewards to informers as a necessary expense under a provision of the Export Control Act of 1949 which authorized the obtaining of confidential information incident to enforcement of the act).

⁶ While GSA may have the ability to influence GSA employees working in GSA-tenant buildings to respond to the survey without offering incentives, the number of GSA employees responding to the survey will comprise a small proportion of total respondents.

are met, it is necessary for GSA to collect valid information about the status of federal buildings and the needs of federal employees. Also, as noted earlier, GPRA places a premium on agency acquisition of information needed to measure performance towards their goals since agencies now must report annually on their performance. Pub. L. No. 103-62, 107 Stat. 285.

One important way to collect measurable information on performance is through the use of data collection instruments. Indirect incentives, such as self-addressed, postage-paid envelopes, free software to compile requested information, and free copies of publications resulting from the survey, are commonly used by the federal government to collect data for a variety of purposes. No objections to these practices have been raised. GSA does not control the surveyed employees nor does it have the authority to compel federal employees to return data collection instruments. However, by using incentives, it can encourage federal employees to provide the information it needs. Indeed, GSA has demonstrated, statistically, that conducting a drawing in connection with its customer satisfaction surveys will enhance the response rate to the survey and, thus, the value to GSA of the information that GSA obtains from its customers. We, therefore, have no objection to GSA's use of the Federal Buildings Fund for this purpose.⁷

Apart from the appropriations law issue addressed above, various federal statutes prohibit federal employees and the public from participating in lotteries except under limited circumstances. See, e.g., 18 U.S.C. §§ 1301-1304. The essential elements of a lottery include: (1) the distribution of prizes, (2) according to chance, (3) for consideration. See Federal Communications Commission v. American Broadcasting Co., Inc., 347 U.S. 284 (1954). A test for sufficient consideration is "whether the act, forbearance or return promise results in a benefit to the promisor or a detriment to the promisee." Laurence P. Simpson, The Handbook of the Law of Contracts, 80 (2d ed. 1965). The act, forbearance or return promise must be bargained for as the required return for the promise. Id. at 99. In our 1991 NOAA decision, we observed that its proposal to award prizes for the return of fish tags contained the first two elements of a lottery and arguably the third, i.e., consideration. 70 Comp. Gen. 720 (1991). We suggested that NOAA consult with the Department of Justice, the Office of Personnel Management, and appropriate congressional committees before implementing the proposal.

In its submission, GSA noted its conclusion that by not requiring federal employees to fill out a survey in order to enter the drawing, consideration would not be

⁷ Our decisions prohibiting the use of appropriated funds for personal gifts are not applicable here. We have consistently held that agencies may not use appropriated funds to purchase personal gifts or awards, except as authorized by law. See 57 Comp. Gen. 385 (1978); 54 Comp. Gen. 976 (1975); 55 Comp. Gen. 346 (1975). In these cases, and in others in which we applied the general prohibition, we based our conclusion on the absence of any direct connection, such as exists in this case, between the purpose for which the funds were appropriated and the gifts or awards in question.

required, and thus its drawing would not be a prohibited lottery. We appreciate the point. However, since these statutes at issue are criminal statutes, we offer no opinion on whether GSA's proposed drawing as presently structured would avoid the consideration element of a prohibited lottery. As we did in our response to NOAA, we suggest that GSA consult with the Department of Justice before implementing its proposal.

Anthony H. Gamboa
Acting General Counsel



GAO

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Telecommunications and Information Administration—Gift Cards for Respondents to the Converter Box Coupon Program Survey

File: B-310981

Date: January 25, 2008

DIGEST

The National Telecommunications and Information Administration (NTIA) may use appropriated funds to purchase gift cards as an incentive to encourage individuals to complete and return a survey designed to gather information about NTIA's converter box coupon program. NTIA deems this information essential to the success of the \$1.5 billion program. Although a gift card might otherwise be viewed as a personal expense, a direct connection exists between the use of the gift cards and the production of information important to the execution of NTIA's statutory duties. The amount of the expenditure is modest, and the primary beneficiary of the expenditure is the government.

DECISION

The Department of Commerce (Commerce) has requested a decision regarding the National Telecommunications and Information Administration's (NTIA)¹ plans to purchase gift cards for respondents to a survey in an effort to increase the survey response rate and provide timely information to the department. Letter from Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce, to Gary L. Kepplinger, General Counsel, GAO, Jan. 11, 2008 (Fredericks Letter). The survey is part of a pilot program designed to evaluate NTIA's planned digital converter box coupon program before full-scale launch of the program. Because of the significant time constraints under which NTIA is operating, the need for the information, and the direct connection between use of the gift cards and the production of information important to NTIA's execution of its statutory duties, we do not object to NTIA's use of appropriations to purchase the gift cards.

¹ NTIA is part of the Department of Commerce.

Our practice when rendering decisions is to obtain the views of the relevant federal agencies. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal.htm. Because Commerce asked that we expedite our decision in this matter, we relied, in this case, on the legal views and facts that Commerce provided us in its letter requesting this decision and that Commerce officials provided us in a telephone conference call. Fredericks Letter; Telephone Conversation between Anita Wallgren, Program Director, NTIA; Milton Brown, Deputy Chief Counsel, NTIA; Sarah Coe, Senior Counsel, Commerce; Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO; and Wesley Dunn, Senior Staff Attorney, GAO, Jan. 16, 2008 (NTIA Conversation).

We do not opine in this decision on NTIA's survey methodology or whether the survey as designed is the best means of obtaining information regarding the converter box coupon program.

BACKGROUND

The Digital Television Transition and Public Safety Act of 2005 (Act) requires all full power television stations in the United States to cease broadcasting analog signals and switch to digital broadcasts by February 17, 2009. Pub. L. No. 109-171, title III, § 3002, 120 Stat. 4, 21 (Feb. 8, 2006). Once the transition is complete, households with televisions incapable of receiving a digital signal will be without television service unless they subscribe to cable, satellite, or other subscription television services, acquire a television capable of processing and displaying a digital signal, or purchase a digital-to-analog "converter box" to install on their analog television sets. GAO, *Digital Television Transition: Increased Federal Planning and Risk Management Could Further Facilitate DTV Transition*, GAO-08-43 (Washington, D.C.: Nov. 19, 2007), at 1.

To assist these households, the Act established a program, which NTIA administers, to subsidize converter box purchases. Pub. L. No. 109-171, § 3005. Each household may obtain a \$40 coupon to be applied towards the purchase of a converter box from a retailer participating in the program.² *Id.* A single household may receive a maximum of two coupons, but the two coupons may not be used towards the purchase of a single converter box. *Id.*

The Act also established the Digital Television Transition and Public Safety Fund (Fund) to cover the costs of the converter box coupon program. Pub. L. No. 109-171, § 3004. The Fund consists of receipts from auctions to be conducted by

² Converter boxes are expected to cost between \$50 and \$70. Library of Congress, Congressional Research Service, *The Transition to Digital Television: Is America Ready?* No. RL34165 (Jan. 2, 2008), at 4.

the Federal Communications Commission (FCC) of portions of the radiomagnetic spectrum that become vacant as television stations, pursuant to the Act's direction, cease broadcasting analog signals.³ *Id.* Initially, NTIA will borrow funds from the Treasury; NTIA will reimburse Treasury as proceeds from the FCC auctions are deposited in the Fund.⁴ *Id.* § 3005(b); Fredericks Letter.

In March 2007, NTIA adopted a final rule regarding the design and administration of the converter box coupon program. 47 C.F.R. part 301. Households may apply for coupons by phone, mail, or the Internet. 47 C.F.R. § 301.3. Coupons arrive in the mail and may be redeemed at participating retailers within 90 days of issuance.⁵ *Id.* § 301.4.

In August 2007, NTIA contracted with International Business Machines (IBM) to implement and conduct the converter box coupon program. Fredericks Letter. Since then, NTIA and IBM have been setting up the coupon request apparatus, certifying retailers to participate in the program, and ensuring that retailers and their employees are ready to administer their part of the program. *Id.* NTIA began accepting applications from consumers for coupons on January 1, 2008. *Id.* IBM expects to begin issuing coupons to applicants nationwide on February 17, 2008. *Id.*

Before consumers begin redeeming coupons on a large scale, NTIA and IBM are conducting a pilot that will test the program's processes and systems in an attempt to detect any problems. *Id.* NTIA and IBM have recruited 220 NTIA and IBM employees, as well as employees of IBM subcontractors, to participate in the pilot

³ The FCC will auction off some of the newly freed wavelengths of the spectrum to commercial wireless service providers and will dedicate the remaining wavelengths to public safety communications services. GAO-08-43, at 1. The first of these auctions took place on January 24, 2008. FCC, *Auctions*, available at wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=73 (last visited Jan. 24, 2008).

⁴ In addition to funding the converter box coupon program, the Fund is available for grants to assist public safety agencies in the acquisition of communications systems, a digital television system in the New York City area, various assistance programs for low-power television stations, and a national tsunami warning program. Pub. L. No. 109-171, §§ 3006–3010. At the end of fiscal year 2009, the Secretary of Commerce will transfer \$7.363 billion from the Fund to the general fund of the Treasury to contribute towards reduction of the federal deficit. *Id.* § 3004; GAO-08-43, at 1.

⁵ Participating retailers include large national electronics chains. NTIA Conversation.

program.⁶ NTIA Conversation. NTIA is conducting the pilot in the Washington, D.C., and Wichita, Kansas, areas. *Id.*

Like members of the public, participants will order coupons from NTIA, take them to a local retailer and redeem them to purchase a converter box, then install the converter box on their analog televisions. *Id.* NTIA asks participants of the pilot program to fill out a questionnaire regarding their experience. NTIA Conversation. IBM will review these questionnaires to gather information regarding the efficacy of the converter box coupon program.⁷ Fredericks Letter. Using this information, NTIA and IBM hope to fix problems with the coupon program before beginning the full-scale launch of the program in mid-February 2008. *Id.*

As an incentive to complete and return the survey quickly, NTIA would like to provide a gift card to every pilot program participant who returns a completed survey. The card is worth \$25 and redeemable at the retailer where the participant purchased the converter box. Fredericks Letter. Referring to the advice of IBM, NTIA believes that providing a \$25 gift card as an incentive will significantly increase the likelihood that participants will complete the survey in a timely fashion. *Id.* NTIA would purchase the gift cards with funds from the Digital Television Transition and Public Safety Fund. *Id.* NTIA asks whether funds are available for this purpose. *Id.*

DISCUSSION

At issue here is the use of appropriations to pay for an item that is ordinarily considered to be a personal gift. As a general matter, appropriated funds are not available for personal items, such as gift cards. B-247966, June 16, 1993. However, we have not objected to the use of appropriated funds to cover what would otherwise be personal items where the benefit accruing to the government outweighs the personal nature of the expense. *See, e.g.*, B-309604, Oct. 10, 2007; B-309715, Sept. 25, 2007. Accordingly, in certain circumstances an agency's appropriated funds may be available to provide items that may otherwise be personal in nature when these items serve as incentives to acquire information necessary to the achievement of the agency's statutory goals.

⁶ Fewer than 20 participants are NTIA employees, and NTIA determined that because participation in the converter box coupon program is not the type of activity that NTIA employees would perform pursuant to their regular duties, it cannot compel its employees to participate in the pilot program. NTIA Conversation.

⁷ We assume, for purposes of this decision, that the pilot program complies with the requirements of the Paperwork Reduction Act of 1995 regarding surveys conducted by government agencies. Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995).

For example, in a 2005 decision, we agreed that the Veterans Benefits Administration (VBA) could use its appropriations to provide light refreshments at focus group meetings in order to encourage attendance at the meetings and improve the quality of the information exchange. B-304718, Nov. 9, 2005. VBA, to satisfy its statutory responsibility to measure and evaluate its programs to determine their effectiveness, conducted focus groups attended by veterans and their families. *Id.* Relying on the advice of various experts, VBA had determined that holding focus groups at the dinner hour and providing light refreshments was the most effective means of conducting focus groups. *Id.* VBA also noted that an offer of light refreshments at the focus groups created a relaxed atmosphere more conducive to the free exchange of opinions crucial to a focus group's success. *Id.* We concluded that although in other circumstances the refreshments might be an impermissible use of appropriated funds to cover personal expenditures, VBA's appropriation was available to purchase light refreshments in these circumstances because VBA had demonstrated a direct connection between the use of the particular incentive and the accomplishment of VBA's statutory goals. *Id.*

In a 2000 decision, we agreed that the General Services Administration (GSA) could use its appropriations to pay for prizes in a drawing held in connection with customer satisfaction surveys. B-286536, Nov. 17, 2000. GSA, responsible for the operation, maintenance, and protection of most government buildings, is required to survey the public building needs of federal agencies. 40 U.S.C. § 611. For several years, GSA had attempted to collect such information through customer satisfaction surveys of employees of its tenant agencies. B-286536. Faced with a declining response rate, GSA proposed to offer prizes to individuals who completed and returned the survey. *Id.* GSA determined that by offering the prizes as incentives, individuals would be more likely to return the surveys. *Id.* We concluded that in these circumstances, GSA, using incentives, could encourage employees to participate in surveys they might otherwise ignore, thereby providing GSA with information vital to its statutory mission. *Id.*

In both of these cases, the agencies established a need for the information sought and a direct connection between the use of incentives and the production of information important to carry out the agency's statutory responsibilities effectively. In a similar vein, NTIA would like to use an incentive to stimulate the production of information it deems essential to a quick evaluation of the processes and systems designed to implement its converter box coupon program.

NTIA contends that the success of the \$1.5 billion converter box coupon program depends, in part, on obtaining consumer feedback regarding glitches or failures in the system it has in place to administer the program. Fredericks Letter. NTIA intends to obtain this feedback through its pilot program; it views the pilot program as an "early warning system" to identify problems prior to deployment of the system nationwide in mid-February 2008. *Id.*

Of course, the pilot will prove useful only to the extent NTIA can encourage participants to provide their feedback to NTIA, and NTIA believes that offering gift cards as incentives for pilot program participants to return surveys will greatly increase the response rate. *Id.* NTIA's contractor, IBM, has told NTIA that incentives such as gift cards are extremely important tools for ensuring a rate of response great enough for NTIA to obtain meaningful information from the pilot program. NTIA Conversation. *See also* Thomas W. Mangione, *Mail Surveys*, in *Handbook of Applied Social Research Methods*, 408 (Leonard Bickman and Debra J. Rog eds., 1998) ("Other than follow-up reminders, there is no technique more likely to improve [a] response rate than incentives."). NTIA emphasizes that it needs to obtain the information from the pilot program in a very short time, so that it can make any necessary changes to correct problems the pilot program identifies before the mid-February national launch of the converter box coupon program. Fredericks Letter.

The benefit accruing to the government from the use of the gift cards outweighs the personal nature of the expense involved. NTIA is operating under significant time constraints, involving a \$1.5 billion program. The facts indicate a direct connection between the use of gift cards and the production of information important to carrying out NTIA's statutory duties, and the amount involved is modest. In these circumstances, we would not object to the purchase of gift cards as an incentive for pilot program participants to complete the surveys and return them in a timely fashion.

CONCLUSION

We do not object to NTIA's use of its appropriation to purchase gift cards for participants in its pilot program who complete and return a survey regarding their experience. The government, rather than recipients of the gift cards, is the primary beneficiary of the expense. NTIA is operating under strict time constraints, and a direct connection exists between the use of the gift cards and the production of information important to the execution of NTIA's statutory duties.

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Gary L. Kepplinger
General Counsel



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Consumer Product Safety Commission—Purchase of Gift Cards

File: B-323122

Date: August 24, 2012

DIGEST

The Consumer Product Safety Commission's (CPSC) appropriated funds are not available to purchase and distribute gift cards as an incentive to join the Neighborhood Safety Network (NSN). CPSC has not established that the distribution of gift cards is essential to achieve a specific CPSC statutory responsibility. Further, under the facts considered here, CPSC may not direct its contractor to use contract funds to purchase gift cards for distribution as an incentive to increase NSN membership.

DECISION

The General Counsel of the Consumer Product Safety Commission (CPSC) requests a decision under 31 U.S.C. § 3529(a) regarding whether CPSC may use appropriated funds to purchase gift cards that it would give to members of the public who join CPSC's Neighborhood Safety Network (NSN). Letter from General Counsel, CPSC, to General Counsel, GAO, Jan. 20, 2012 (Request Letter). The General Counsel asks, alternatively, whether CPSC may allow its contractor to use contract funds to give away gift cards. As explained below, the gifts cards are in the nature of personal gifts and are not necessary to further a statutorily-established CPSC requirement. Accordingly, CPSC's appropriation is not available for this purpose. For similar reasons, CPSC may not direct its contractor to purchase and distribute gift cards.

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies to establish a factual record and to establish the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. The record in this case consists of the Request Letter, CPSC's response to a letter from GAO seeking further information relevant to this matter, and the record of a telephone

conversation between GAO and CPSC staff members. Letter from Attorney, CPSC, to General Counsel, GAO, Mar. 14, 2012 (Response Letter); Telephone Conversation between Attorney, CPSC, and Senior Attorney, GAO (Apr. 4, 2012) (Telephone Conversation).

BACKGROUND

CPSC's statutory mission is to protect the public from unreasonable risks of serious injury or death from consumer products under the agency's jurisdiction. 15 U.S.C. § 2051(b); Request Letter, at 1. To further this mission, CPSC has launched the NSN, a project designed to encourage and support individuals and organizations that wish to distribute product safety information to what CPSC considers "hard to reach" populations, such as the elderly, low-income families, and some minority groups. *Id.* See also "About the Neighborhood Safety Network," at <http://www.cpsc.gov/nsn/about.html> (last visited August 7, 2012). The NSN website provides the public with free access to product safety posters, publications, checklist, and tools that can be downloaded and used to create a neighborhood safety program. Request Letter, at 1. The goal of the project is to have individuals and organizations "become partners in [CPSC's] campaign to share lifesaving safety information with consumers who may not be aware of the many hazards that exist in and around the home." "Neighborhood Safety Network Database Signup Form" at <http://www.cpsc.gov/nsn/signup.html> (last visited August 7, 2012).

Individuals and organizations may elect to become a member of NSN free of charge by submitting, through the NSN website, their contact information and information regarding the population they wish to serve in their communities (elderly, low-income, etc.). Request Letter, at 1. Only NSN members receive biweekly electronic newsletters with current product safety information. Response Letter, at 1. While the newsletters consist largely of information already available to the public on CPSC's website, according to CPSC, they "are created in order to make it easier for the members to use to develop their own communication vehicles for their communities." *Id.*

In September 2011, CPSC engaged a contractor to develop and implement a "membership drive" to increase membership in NSN. Request Letter, at 1. The contract provides that the contractor, among other things, "shall carry out a campaign to increase the visibility of NSN by signing up to 3,000 . . . service providers, associations, and organizations for the Network." Contract between CPSC and Stratacomm LLC, dated September 29, 2011. CPSC proposes to purchase and distribute \$5.00 gift cards as an incentive to join NSN. Request Letter, at 1. CPSC would purchase the cards directly or, alternatively, ask the contractor to use contract funds to purchase the cards. *Id.* at 1–2. CPSC believes that offering the gift cards as an incentive will significantly increase the number of individuals who join NSN during the membership drive. *Id.* CPSC proposes to purchase up to 2,000 gift cards and charge the cost of the cards to its annual lump sum appropriation for

salaries and expenses, which is available for the “necessary expenses” of CPSC.¹
Id.

ANALYSIS

At issue here is the use of appropriated funds to pay for an item that is ordinarily considered to be a personal gift. Appropriated funds generally are not available for personal items. Because of the clear potential for abuse, we find exceptions to the general rule only rarely. See, e.g., B-318386, Aug. 12, 2009; B-310981, Jan. 25, 2008; B-309604, Oct. 10, 2007; B-309715, Sept. 25, 2007. We recognize that, occasionally, some gift items in some contexts may advance legitimate agency goals and policies as opposed to simply attracting attention to the agency and its programs. Thus, we have held that appropriated funds are available to purchase and distribute personal items where an agency has demonstrated that the gift item will directly advance an agency’s statutory requirement. See, e.g., B-318386, B-310981. In such a circumstance, the benefit accruing to the government outweighs the personal nature of the expense, and the expenditure is, therefore, considered a necessary expense of the agency.

In B-310981, we concluded that the National Telecommunications and Information Administration (NTIA) could use appropriated funds to purchase gift cards as an incentive to encourage individuals to complete and return a survey. As part of the United States’ 2009 transition from analog to digital television broadcasts, NTIA was directed by statute to execute a program to provide households needing to purchase digital-to-analog converter boxes with coupons, redeemable at electronics retailers, as a subsidy towards the purchase. Before consumers began redeeming coupons on a large scale, NTIA conducted a pilot program to test its coupon distribution and redemption program processes and systems to ensure smooth distribution and redemption. NTIA asked participants in the pilot program to fill out a survey regarding their experience, and NTIA planned to use information gleaned from the surveys to address problems with the coupon program before launching it nationwide. In order to ensure timely responses and a response rate sufficiently high to obtain meaningful information from the pilot program, NTIA proposed to offer as an incentive a gift card to each participant who returned a completed survey.

We agreed with NTIA that identifying glitches or failures through consumer feedback was essential to the success of the coupon program NTIA was statutorily required to administer, and that the use of gift cards was an appropriate incentive to obtain information essential to NTIA’s success in satisfying a statutory objective—the execution of an effective and efficient program for distributing and redeeming

¹ See Financial Services and General Government Appropriations Act, 2012, Pub. L. No. 112-74, div. C, title V, 125 Stat. 786, 907 (Dec. 23, 2011).

coupons for converter boxes. Therefore, we did not object to the purchase of gift cards in that circumstance. *Id.*

Similarly, in B-318386, we did not object to the U.S. Fish and Wildlife Service's (FWS) proposed use of appropriated funds to purchase and distribute caps and other items to hunters at public outreach meetings where agency staff spoke about the conservation of an endangered species, the eider. These gift items contained images of the protected eider and general conservation messages. FWS had previously attempted numerous, more traditional outreach activities to educate communities, yet the population of the eiders remained in decline. In our view, FWS, in response to the effects of hunting on the population of threatened eiders and having had limited success with more traditional means of educating hunters, had identified an approach strategically designed to reach and educate a particular community of hunters in furtherance of its eider conservation plan. *Id.* at 4–5.

By contrast, in 57 Comp. Gen. 385, the Environmental Protection Agency (EPA) used its appropriation to purchase as gifts to the public plastic novelty garbage cans filled with candy shaped as items of solid waste, such as tin cans, tires, and shoes. EPA gave the novelty garbage cans to attendees who visited EPA's exhibit at an international waste equipment and technology exhibition. The gift was an effort to attract attendees to EPA's exhibit where they could receive information on requirements and implementation of recent environmental legislation. While we did not question EPA's assertion that the garbage cans induced a great many people to visit the EPA booth, we concluded that there was nothing to show that without the distribution of the novelties, the EPA would have been unable to reach its intended audience and disseminate its informational brochures.

Offering a monetary incentive for individuals who agree to receive future information from an agency, as CPSC proposes doing here, is not a proper use of an agency's appropriated funds.² We have consistently held that, even where the agency's overall objective is laudable, an agency may not purchase personal items with appropriated funds unless they are essential, as opposed to preferable, to the achievement of an authorized purpose. See 70 Comp. Gen. 248, 251 (1991). In attempting to attract "hard to reach" groups to CPSC's safety message by issuing gift cards, NSN may further CPSC's overall mission. Nevertheless, CPSC has not established that the issuance of gift cards is essential to, or will directly result in, an increased flow of safety information to "hard to reach" populations. *Compare* 70 Comp. Gen. 248 (cash prizes to individuals providing information critical to achieving statutorily required research) *with* 53 Comp. Gen. 770 (1974) (distribution of ashtrays with the agency seal at agency-sponsored conference to attract attention to

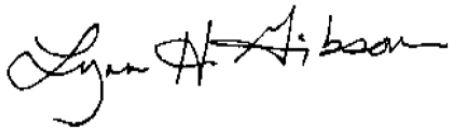
² CPSC asks whether its purchase of the gift cards would be permissible if individuals were required to complete a survey in order to receive the gift card and become NSN members. Request Letter at 2. We cannot answer this question without knowing the purpose of the survey and the information it would elicit.

the agency's mission). In fact, CPSC has no mechanism in place for assessing how NSN members distribute the information they receive from the NSN newsletters. Telephone Conversation between Attorney, CPSC, and Senior Attorney, GAO (Apr. 4, 2012). In sum, the facts presented here do not justify an exception to the general rule that appropriated funds may not be issued for personal gifts absent statutory authority.

CPSC has asked also whether it may allow its contractor to use contract funds to purchase the gift cards. Request Letter, at 1. As a general rule, an agency cannot direct a contractor to undertake activities on behalf of the agency that the agency itself could not undertake. See 68 Comp. Gen. 226 (1989); 62 Comp. Gen. 531 (1983). Consequently, under the facts considered here, CPSC may not enter into a contract directing its contractor to purchase and distribute gift cards.

CONCLUSION

CPSC's appropriation is not available for CPSC's purchase of gift cards for distribution as an incentive to join NSN. In this case, CPSC has not established that the distribution of gift cards is essential to achieve a specific CPSC statutory responsibility. Further, CPSC may not direct its contractor to use contract funds to purchase and distribute gift cards.

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Lynn H. Gibson
General Counsel

U.S. Fish and Wildlife Service-Steller's and Spectacled Eiders Conservation Plan

B-318386: Aug 12, 2009

Because considerable conservation efforts over several years have not halted the decline of two threatened eider species, GAO will not object to the U.S. Fish and Wildlife Service's (FWS) proposed use of appropriated funds to purchase and distribute caps and other items to residents of Alaska North Slope communities in furtherance of the agency's eider conservation plan. FWS will print images of the threatened eiders on these items and, for some items, include eider conservation messages. The items, which FWS will distribute as part of agency outreach events, will help residents identify the threatened species and serve as reminders of the agency's conservation message.

B-318386, U.S. Fish and Wildlife Service--Steller's and Spectacled Eiders Conservation Plan, August 12, 2009

Decision

Matter of: U.S. Fish and Wildlife Service--Steller's and Spectacled Eiders Conservation Plan

File: B-318386

Date: August 12, 2009

DIGEST

Because considerable conservation efforts over several years have not halted the decline of two threatened eider species, GAO will not object to the U.S. Fish and Wildlife Service's (FWS) proposed use of appropriated funds to purchase and distribute caps and other items to residents of Alaska North Slope communities in furtherance of the agency's eider conservation plan. FWS will print images of the threatened eiders on these items and, for some items, include eider conservation messages. The items, which FWS will distribute as part of agency outreach events, will help residents identify the threatened species and serve as reminders of the agency's conservation message.

DECISION

The U.S. Fish and Wildlife Service (FWS) Alaska Regional Director requests an advance decision under 31 U.S.C. sect. 3529(a) regarding the use of appropriated funds to purchase and distribute items such as T-shirts, baseball caps, stocking caps, and coffee mugs to North Slope communities in furtherance of the agency's eider conservation plan. Letter from Alaska Regional Director, FWS, to Acting Comptroller General, GAO, June 16, 2009 (Request Letter). As explained below, because traditional methods of public outreach and education have failed to halt the decline of threatened eiders, FWS may use appropriated funds to purchase and distribute the items as part of an education plan strategically designed to reach North Slope residents.^[1]

BACKGROUND

FWS is responsible for determining "policies and procedures that are necessary and desirable in carrying out ... laws relating to fish and wildlife." 16 U.S.C. sect. 742f(a). The Endangered Species Act of 1973 (ESA), as amended, is one such law, providing for "a program for the conservation of [threatened] . . . species." 16 U.S.C. sect. 1531(b).

Steller's and spectacled eiders are "two threatened waterfowl species . . . [that] breed, raise broods, stage, and migrate" throughout the remote Alaska North Slope. Request Letter. Some species of eiders (e.g., common and king eiders) are legal to hunt, but steller's and spectacled eiders are not.^[2] FWS, *Conservation Measures for Steller's and Spectacled Eiders During the 2009 Alaska Migratory Bird Subsistence Harvest and 2009 Migratory Game Bird Hunt*, at 1, 7, Apr. 2, 2009 (Eider Conservation Strategy). However, the population of protected eiders continues to decline as a result of hunting. See Eider Conservation Strategy; FWS, *Biological opinion for 2009 Alaska Migratory Bird Subsistence Harvest*, Apr. 6, 2009 (Biological Opinions).

Critical to the protection of steller's and spectacled eiders is hunter proficiency at distinguishing among eider species, particularly on-the-wing identification. Eider Conservation Strategy at 7. During the summer months, the protected eiders inhabit many of the same areas as the unprotected eiders and often fly in mixed-species flocks. Eider Conservation Strategy at 7–8; Biological Opinion at 15. The agency conceived a host of outreach actions aimed at educating North Slope residents about eider conservation in general, and developing eider identification skills in particular, including on-the-wing identification proficiency.^[3] Eider Conservation Strategy; Memorandum of Understanding Between the North Slope Borough, Ukeagvik Inupiat Corporation, the Inupiat Community of the Arctic Slope, and the Native Village of Barrow and Department of the Interior, The U.S. Fish and Wildlife Service, Sept. 26, 2008. FWS has convened public meetings in North Slope villages, hosted public radio talk shows, submitted articles to local newspapers, distributed pamphlets and fliers, and displayed posters in affected villages. Request Letter; Assistant Director E-mail.

However, FWS explains that while the agency is undertaking an aggressive education strategy, efforts to date have made very little difference. Request Letter. In spring 2009, FWS implemented a multifaceted conservation strategy aimed at protecting threatened steller's and spectacled eiders. Eider Conservation Strategy. For example, because of 2008 mortality rates, FWS this year plans to continue its meetings with residents in four villages where protected eiders historically reside during summer months as well as with hunters at the annual Duck Camp where a large number of steller's eiders were killed last year. Eider Conservation Strategy at 10. FWS also plans a sustained law enforcement presence, including 24-hour coverage in Barrow. *Id.* at 11. In addition, FWS is considering educating hunters by distributing caps and other items at public outreach meetings where agency staff are speaking about eider conservation. Assistant Director E-mail. These items will contain images of the protected eiders and simple conservation messages. According to FWS, standard marketing methods such as posters, newspapers, and fliers do not work in the North Slope, and in rural Alaska there are no "freeways, billboards, etc. that flood mainstream America." Request Letter. FWS notes that most North Slope residents wear baseball caps for protection from cold, wind, and bright 24-hour summer daylight, and that T-shirts are typical apparel. Assistant Director E-mail. FWS hopes that the items will focus public awareness on the gravity of the eiders' situation. Assistant Director Phone Conversation. FWS expects that the villagers and hunters receiving these items will become "walking billboard[s] for [eider] conservation messages" as the recipients use the items on a daily basis in the broader community, and that these items will serve as constant reminders to hunters, who will see the items whether or not they attended an outreach meeting. *Id.*; Assistant Director E-mail.

DISCUSSION

At issue here is whether FWS may use appropriations to distribute items that would otherwise be considered personal gifts. As a general rule, appropriated funds may not be used for personal gifts without specific statutory authority. B-307892, Oct. 11, 2006. Because of the clear potential for abuse, we find exceptions to the general rule only rarely. We recognize that, occasionally, some gift items in some contexts may advance legitimate agency goals and policies as opposed to simply attracting attention to the agency and its programs. We will consider exceptions to the general rule only after careful consideration of particular factual circumstances in which an agency can demonstrate that the gift item will directly advance an agency's statutory mission and objectives. See, e.g. B-310981, Jan. 25, 2008 (National Telecommunications and Information Administration's purchase of gift cards as an incentive to encourage participation in a survey of its digital converter box coupon program was a necessary expense of the agency's duty to establish and administer a program subsidizing the purchase of analog-to-digital converter boxes); 62 Comp. Gen. 566 (1983) (Army Chaplain's Office purchase of calendars publicizing scheduled services was a necessary expense of the Chaplain's duty to coordinate religious services for uniformed servicemen and their families); B-193769, Jan. 24, 1979 (National Park Service purchase of quarried volcanic rocks was a necessary expense of maintaining a national monument by deterring visitors from removing naturally occurring lava rock found along the park's roads and trails). If the gift item serves only to attract attention to the agency, the well-established rule is that the expenditure is not an authorized use of appropriated funds.

In this case, FWS has broad authority to establish policies and programs "necessary and desirable" to implement fish and wildlife laws and protect threatened species. With its multifaceted eider conservation program, FWS is attempting to protect two threatened species by educating hunters on accurate species identification and asking them to be more discriminate in the birds they take. As explained above, FWS has already tried numerous, more traditional approaches to educate North Slope communities, yet the population of threatened eiders remains in decline because of hunting. Continuing to identify ways to educate residents and hunters and achieve its goal of eider conservation, FWS proposes to distribute at outreach meetings caps and other items that will contain images of the protected eiders and conservation messages. Because of the nature of these items, FWS expects that they will remain in use and on view in North Slope villages throughout the hunting season. Clearly, these items are personal gifts to the recipients. From the government's perspective, however, these items will serve as reminders to residents and hunters of the protected status of the eiders and will aid in identifying the protected eiders and distinguishing them from unprotected species.

The distribution of items that include conservation messages and images of threatened eiders advances FWS's objective of educating the recipients of the items as well as others who view those items even though they may not have attended an outreach meeting, and FWS's ultimate objective of protecting threatened species. In our view, FWS, in response to the effects of hunting on the population of threatened eiders and having had limited success with more traditional means of educating hunters, has identified an approach strategically designed to reach and educate a particular community of hunters in furtherance of its eider conservation plan. We do not object, therefore, to FWS's use of its appropriations for this purpose.



Daniel I. Gordon
Acting General Counsel

[1] Our practice when issuing decisions is to obtain the facts and views from the relevant agency. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In addition to materials provided with the request letter, FWS supplied supporting information by e-mail and telephone. E-mail from Assistant Regional Director, Migratory Birds and State Programs, Alaska Region, FWS, to Managing Associate General Counsel, GAO, *Subject: Threatened Eider Conservation in Alaska*, June 30, 2009 (Assistant Director E-mail); Telephone Conversation between Assistant Regional Director, Migratory Birds and State Programs, Alaska Region, FWS, and Assistant General Counsel for Appropriations Law and Staff Counsel, GAO, July 7, 2009 (Assistant Director Phone Conversation).

[2] In the past, Native Alaskans were allowed to hunt steller's and spectacled eiders even though they are listed as threatened species. See 16 U.S.C. sect. 1539(e). FWS has suspended hunting by Native Alaskans because the species have declined to dangerously low levels. See *Migratory Bird Subsistence Harvest in Alaska; Harvest Regulations for Migratory Birds in Alaska During the 2009 Season*, 74 Fed. Reg. 23336 (May 19, 2009) (to be codified at 50 C.F.R. pt. 92).

[3] For an example of eider identification materials, see FWS, *Steller's Eiders Need Your Help - Do Not Shoot Them!*, available at <http://alaska.fws.gov/ambcc/ambcc/Eiders.pdf> (last visited Aug. 7, 2009).